

NTSB Order No. EA-4302

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD  
at its office in Washington, D.C.  
on the 7th day of December, 1994

Docket SE-12871

91.13(a).<sup>2</sup> The law judge dismissed the added charge that respondent had also violated 14 C.F.R. 121.315(c).<sup>3</sup> The law judge reduced the Administrator's 30-day proposed suspension of respondent's air transport pilot certificate to a 20-day suspension. We grant the appeal and dismiss the Administrator's order.

Respondent was non-flying pilot-in-command (PIC) of Midwest Express Airlines' November 25, 1991 flight from Boston to Milwaukee. The flight was operated using a DC-9 aircraft, and two pilots were on board.<sup>4</sup> Also in the cockpit for the flight was an FAA safety inspector, Jerome Polak, along to perform an enroute inspection.

In his complaint (order), the Administrator charged that respondent had failed to follow cockpit procedures because, if checklists had been correctly performed, respondent would have learned that the auxiliary hydraulic pump switch was incorrectly

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<sup>2</sup>§ 91.9(a), Civil aircraft flight manual, marking, and placard requirements, provides:

(a) Except as provided in paragraph (d) of this section, no person may operate a civil aircraft without complying with the operating limitations specified in the approved Airplane or Rotorcraft Flight Manual, markings, and placards, or as otherwise prescribed by the certificating authority of the country of registry. . . .

§ 91.13(a) provides:

No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

<sup>3</sup>This rule requires that the flight crew shall follow approved cockpit check procedures when operating the aircraft.

<sup>4</sup>Respondent's co-pilot/first officer was Eric Phillips.

in the off position during takeoff. The Administrator also contended that, with the switch off, respondent had failed to operate the aircraft in conformance with its operating limitations.

The Administrator's case was presented through the testimony of Inspector Polak. Mr. Polak testified that he watched the pilots perform their pre-takeoff duties, including completion of various checklists. On the takeoff roll, when the aircraft had reached a speed of approximately 80 knots, he testified, he happened to notice that the auxiliary hydraulic pump switch was off, when it should have been on. He did not notify either pilot of this situation, nor did he tell them at any time during the flight. On arrival at the gate at Milwaukee, and during the inspector's "debriefing," he advised them of the incident.

Based on Mr. Polak's testimony that the checklists were properly performed,<sup>5</sup> the § 121.315(c) claim was dismissed. The law judge found, as a matter of fact, however, that the switch was in the off position during takeoff and, therefore, that the aircraft had been operated in a manner that violated its operating limitations. The law judge found as a matter of law that, as PIC, respondent was responsible. The law judge therefore affirmed the § 91.9(a) and 91.13(a) allegations, the latter as a derivative violation.<sup>6</sup>

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<sup>5</sup>Both pilots also so testified.

<sup>6</sup>See Administrator v. Pritchett, NTSB Order EA-3271 (1991) at fn. 17, and cases cited there (a violation of an operational regulation is sufficient to support a finding of a "residual" or

On appeal, respondent argues that a preponderance of the evidence does not support the law judge's finding that the switch was in the off position at takeoff, and that, even if it were, safety was not implicated and the law judge's finding imposes a "counterproductive, if not dangerous" burden on PICs. Respondent further argues that the law judge's conclusion that respondent violated the two regulations is inconsistent with our precedent holding that a PIC may reasonably rely on the proper performance of duties by crew members. The law judge did not address this subject in his initial decision. Because we agree that respondent reasonably relied on his first officer, Mr. Phillips, we reverse the initial decision and dismiss the complaint.

In Administrator v. Fay & Takacs, NTSB Order EA-3501 (1992), we reviewed our precedent in this area and explained, at 9:

As a general rule, the pilot-in-command is responsible for the overall safe operation of the aircraft. If, however, a particular task is the responsibility of another, if the PIC has no independent obligation (e.g., based on operating procedures or manuals) or ability to ascertain the information, and if the captain has no reason to question the other's performance, then and only then will no violation be found.

Here, there is no dispute that it was the first officer's sole responsibility to place the switch in the on position for takeoff. He testified that he did so, and that he announced to respondent that his checklist was complete.<sup>7</sup> According to the  
(..continued)  
"derivative" section 91.9 (now section 91.13(a)) violation).

<sup>7</sup>The Administrator may no longer avail himself of his reply

record, respondent was physically able to see the switch, but it was some distance from his seat.<sup>8</sup> Broadly speaking, he was able to ascertain the switch's position, but a finding based on this fact would support a requirement that the PIC double-check all first officer instrument settings. Such a result is not favored as a practical matter. See Administrator v. Lusk, 2 NTSB 480, 482 (1973) (an airline captain cannot be required personally to verify every representation made to him by any member of the flight or ground crews).

The question thus becomes whether respondent was obliged to double-check, either because he had reason to question Mr. Phillips' performance or because he had an independent obligation under the operating procedures or manuals. We must answer in the negative to both alternatives.

There is no basis in the record to find that respondent had any reason to question his first officer's checklist performance generally or of this item. Respondent, in attacking the inspector's credibility, argues that multiple "annunciator" lights would have gone on in the cockpit were the switch in the

(..continued)  
argument that respondent should be held accountable because, presumably, he did not ensure that Mr. Phillips completed the checklist. The law judge dismissed this charge, finding the checklist was completed properly and the Administrator has not appealed that finding.

<sup>8</sup>Respondent testified that the switch was approximately 3 feet from his seat and to the right, 18-24 inches from the hydraulic pressure indicators, and 12 inches from the bottom-most engine indicators. Tr. at 192-193. Notwithstanding the law judge's finding (Tr. at 278), which we reverse, the switch obviously was not directly in front of Captain Krueger.

off position (Appeal at 7), thus also suggesting that respondent would easily have seen these lights and should have known something was wrong. The Administrator adopts this interpretation of the testimony as well, but it misunderstands the evidence. These lights would go on only if the switch were off and the right engine failed, and respondent so testified. Tr. at 211-212.<sup>9</sup> There is also no evidence that another gauge on the cockpit instrument panel, whether or not respondent was obliged to monitor it, would have told respondent that this auxiliary switch was not engaged. Moreover, the first officer was very experienced, and the Administrator offered nothing in his past performance to support a finding that respondent should have questioned his competency. Indeed, the Administrator concedes the point. Reply at 25.

There is also no basis to find that respondent had an independent duty to monitor this switch. The Administrator cites respondent's duty to observe any discrepancies from normal parameters. Despite the PIC's ultimate responsibility for the safe operation of the aircraft, we have declined to impose a strict liability standard. The Administrator would do so here. As the non-flying pilot, respondent was specifically charged, at the time of takeoff, with ATC communications, with monitoring speed and engine pressure, with making various callouts, and with

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<sup>9</sup>This conclusion is also supported in the record by the fact that no one of the three in the cockpit testified to seeing any annunciator lights on.

watching the runway environment.<sup>10</sup> We disagree with Inspector Polak's testimony (Tr. at 98) that respondent was doing nothing at the time of takeoff roll (and, therefore, could and should have checked this switch). Overall, we liken this case more to Administrator v. Dickman and Corrons, 3 NTSB 2252 (1980) (PIC not responsible for misloading of cattle when proper loading not immediately discernible and the responsibility of others in the first instance) than to the other cases cited by the Administrator.<sup>11</sup>

Assuming the switch was, in fact, off (a finding we need not review although one for which we find the record unsatisfactory), we cannot find that respondent should be held accountable. Respondent was performing critical functions of monitoring engine pressure, making speed readouts, and monitoring the runway environment. Considering also that it is his sole responsibility to make any abort decisions (Tr. at 169), takeoff roll is not the time to expect the PIC to be monitoring all of many cockpit instruments or this one (which the Administrator appears to agree has multiple redundancies).

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<sup>10</sup>Prior to taxi respondent had verified that the hydraulic system switches were properly set (Tr. at 160), even though this task was not required of him by company manual or procedure.

<sup>11</sup>And we find the Administrator's reading of it too narrow.

**ACCORDINGLY, IT IS ORDERED THAT:**

1. Respondent's appeal is granted;
2. The initial decision is reversed; and
3. The Administrator's order is dismissed.

HALL, Chairman, LAUBER and HAMMERSCHMIDT, Members of the Board,  
concurred in the above opinion and order.